

PETITION OF THE CITY OF PEKIN, A MUNICIPAL )  
CORPORATION, FOR APPROVAL PURSUANT TO 735 ILCS ) DOCKET 02-0352  
5/7-102 TO CONDEMN A CERTAIN PORTION OF THE )  
WATERWORKS SYSTEM OF ILLINOIS-AMERICAN WATER )  
COMPANY. )

<sup>1</sup> 5 ILCS 100/10-40 contains the same standard as Section 200.610.

## **2. TESTIMONY BASED ON HEARSAY.**

A. The first instance cited by IAW is on Page 11, Lines 233-35 of Mr. Kief's direct testimony: "In talking with the Fire Chief, I know the Fire Department is especially pleased with the prospect of local personnel manning communication systems." This statement fits the exception of Section 200.610. Mr. Kief, as the Director of Public Works, commonly relies upon statements made by the other department heads, including the Fire Chief, in the conduct of his affairs. Therefore, this statement is admissible.

B. The next challenged statement is found on Page 10, Lines 211-212 of Mr. Hierstein's rebuttal testimony: "We have heard from several customers who were placed on hold for over half an hour and gave up when they needed service." Mr. Hierstein, as City Manager, reasonably relies upon comments made by constituents regarding water service being provided in the City.

In Discovery South Group, Ltd. v. The Pollution Control Board, 275 Ill. App. 3d 547, 656 N.E. 2d 51, 211 Ill. Dec. 859 (1995), the court found that testimony regarding telephone complaints to City officials fits within the exception discussed here. In that case, an administrative hearing was held regarding violations of the Environmental Protection Act due to excessive noise coming from a concert venue. After considering a hearsay objection, the court found that a tabulation of the local police department's log regarding telephone complaints were admissible under the Rules of Administrative Procedure (5 ILCS 100/10-40). 656 N.E. 2d, at 56, 211 Ill. Dec., at 864. Additionally, that court left undisturbed testimony from three village trustees regarding complaints they received from citizens 656 N.E. 2d, at 57, 211 Ill. Dec., at 865.

Similarly, Mr. Hierstein simply testified that he had received a citizen's complaint. Therefore, this testimony should be permitted.

C. The final statement challenged under the hearsay rule is found on Page 2, Lines 31-32 of Mr. Janssen's rebuttal testimony: "I have spoken again with the person trying to open that hydrant. He had previously tried to open frozen hydrants, and this one was broken, not frozen." Again, this statement fits the exception found in Section 200.610. Chief Janssen reasonably relies upon statements of his fellow firefighters when trying to work with deficient fire hydrants. Therefore, this statement fits within the exception.

### **3. NEWSPAPER ARTICLES.**

IAW then attempts to strike the testimony of Chief Janssen regarding the contents of certain newspaper articles. Both of the articles which are challenged contain statements made by representatives of IAW. Therefore, they are party-opponent admissions, and are excepted from the hearsay rule. E.g., Gillsan v. Gulf, M. & O.R. Co., 42 Ill. 2d 193, 246 N.E. 2d 269 (1968)

Moreover, the "lack of opportunity to cross-examine is deprived of significance by the incongruity of a party objecting to his own statement on the ground that he was not subject to cross-examination by himself at that time." Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence, Sec. 802.1, Page 525 (4<sup>th</sup> Ed. 1984). If the statements were not accurate, IAW has ample opportunity to correct the record.

### **4. PERSONAL KNOWLEDGE.**

IAW challenges another statement of Chief Janssen regarding gravel in the water coming out of the fire hydrant. Chief Janssen's statement relies upon information he received from the Chief of the Department at that time. Again, this statement fits the exception of Section 200.610. It is reasonable and prudent for a Fire Chief to gather information from prior chiefs regarding the status and operation of the water system.

## **5. OPINION TESTIMONY.**

IAW requests the court to strike certain statements being expressed in the City's testimony. IAW objects to these statements, contending that they express opinions from lay witnesses.

A. The first statement challenged is found on Page 13, Line 270 of Mr. Hierstein's rebuttal testimony. IAW quotes Mr. Hierstein: "The Pekin community is overwhelmingly behind acquisition of the water company." IAW fails to present the entire context in which that statement was made. Mr. Hierstein was responding to a question regarding the referendum campaign. Mr. Hierstein's statement that the Pekin community is overwhelmingly behind acquisition is based on his observation of the election results in favor of acquisition, which occurred in the face of IAW's aggressive campaign. He is not attempting to speak on behalf of the entire Pekin population. He is simply relating his observation.

B. IAW then challenges a passage of Mr. Hierstein's rebuttal testimony, at lines 278-287, which includes several statements regarding the results of the election.

(i) The first is that the public overwhelmingly are in support of the City's efforts to acquire their future by acquiring the City's water system. Again, this statement is made in the context of the election, and, as described in the previous paragraph, this comment regarding the public's support of the City's acquisition of the water system is based on the election results.

(ii) The next sentence in that passage is as follows: "I think the voters ultimately understood that unless the City acquired the system, Pekin's water would be a small part in the corporate games and strategies in the global corporations like Thames and RWE." As described by Graham, "In a sense all testimony to matters of fact is the conclusion of the witness formed from observed phenomena and mental impressions." *Id.*, at 443-444. This statement reflects Mr.

Hierstein's observations of the election and the comments he received from the citizens of the City.

(iii) Next, Mr. Hierstein testified that "the public is sophisticated enough to see through statements from IAW like 'there has been no change, and no sale'." This statement is based on Mr. Hierstein's dealings with and observations of the public. As City Manager, he has extensive experience with members of the public and is aware of their level of sophistication.

(iv) The next sentence: "There has been enough corporate news coverage in the past several years to justify the Pekin public's decision that they didn't want to be a pawn in global water games." Again, Mr. Hierstein is testifying as to the news coverage, which he has personally observed.

(v) The final sentence reads "the stakes for their future, and their present are too great, and I think they saw that." The City agrees that the last clause ("and I think they saw that") is Mr. Hierstein's opinion. However, the first part of that sentence is not. It is a reflection of Mr. Hierstein's years of experience in municipal government. It is based on his observations of the situation in Pekin.

C. Mr. Hierstein's testimony on page 14, lines 294-95: "The City gained the support because the population realized it was in their best interest to acquire the water system." Mr. Hierstein is the City Manager, and is in contact with members of the community on a daily basis. He is also aware of the election results in favor of the City's acquisition of the water system. This statement is merely a fact formed from Mr. Hierstein's observations (Id.), and should not be stricken.

D. IAW challenges the following sentence of Mr. Hierstein, on page 5, lines 111-112 of his rebuttal testimony: "We are confident that the proposed valuation on which all of IAW's

testimony is based is not what will be upheld in court.” IAW argues that this is a legal opinion given by Mr. Hierstein. It is not a legal opinion. It is simply Mr. Hierstein’s statement regarding his confidence that a jury will not believe IAW’s flawed approach. Id., at 405 (witness may testify directly to his own state of mind).

E. IAW then challenges Chief Janssen’s rebuttal testimony, found on page 2, lines 25-27: “The decades-long failure of Illinois-American is the result either of ignorance or insensitivity, either of which has not and does not serve the best interest of the citizens of Pekin.” IAW challenges the first part of this statement, as Chief Janssen “postulating” the reasons for IAW’s inaction. Instead, Chief Janssen used simple powers of deduction - either IAW did know about the gravel problem, or IAW knew about the problem and was not sensitive enough to correct it. It is not an unsubstantiated opinion. It is a result of deductive reasoning based on facts known to Chief Janssen.

## **6. CONCLUSION**

Based on the foregoing, the City of Pekin respectfully requests that the Motion to Strike be denied.

**RESPECTFULLY SUBMITTED,  
THE CITY OF PEKIN**

By: \_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

Edward D. McNamara, Jr., an attorney, hereby certifies that he served copies of the foregoing Response to Motion to Strike of Illinois-American Water Company on the individuals shown on the attached Service List, via electronic mail, on Wednesday, May 7, 2003.

//Edward D. McNamara, Jr.//

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### **VERIFICATION**

I, Edward D. McNamara, Jr., certify that: (i) I am one of the attorneys for The City of Pekin; (ii) I have read the foregoing Response to Motion to Strike of Illinois-American Water Company; (iii) I am familiar with the facts stated therein; and (iv) the facts are true and correct to the best of my knowledge.

//Edward D. McNamara, Jr.//

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